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No. 5823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK (a corporation),
Appellant,

vs.

MURIEL E. COLTHURST,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

HARRY I. STAFFORD,
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To the Honorable William B. Gilbert, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee is entitled to a rehearing in this case. The matter has been erroneously decided; the decision of this Court being entirely based upon a fact not in the record.

The error is found in the following paragraph of the opinion (pages 5-6):

> "The rule, as applied in some of the cases cited, is not without harsh consequences to the injured party. By the carelessness or wilful inaction of the insured who is presumptively antagonistic, one who has a just claim for damages

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> may be defeated without any fault upon his part. *Whether in such a case the standing of the injured party is no better than that of the delinquent insured we need not here determine. Substantial compliance with the terms of the policy was easily within appellee's power. She knew of the terms of the policy for she sued upon it, and she could have seen to it that appellant was promptly furnished with a copy of the complaint and summons and advised of the date service was made upon Harris. It would have been immaterial that she, rather than Harris, furnished such copies and such information.* (*Slavens v. Standard Accident Ins. Co.*, 27 Fed. (2) 859.) The contract and the statute provide for a suit 'under the terms' of the policy or 'subject to its terms and limitations,' and we think in the most favorable view to the injured party, it was contemplated he would comply with such terms to the extent of his ability. Whether he is subject to conditions over which he has no control we do not determine."

It thus appears that the basis of this decision is the fact that "*substantial compliance with the terms of the policy was easily within appellee's power. She knew of the terms of the policy for she sued upon it, and she could have seen to it that appellant was promptly furnished with a copy of the complaint and summons and advised of the date service was made upon Harris.*"

This cause was tried, submitted and should have been decided upon the stipulated statement of facts. Nowhere in that statement does it appear that appellee "*knew of the terms of the policy*" and it is beyond dispute that she did not "*sue upon it.*"

With due deference, we believe this error is due to the Court's misconception of the action.

The facts are:

This litigation had its commencement with the suit of *Colthurst v. Harris* which was commenced in Napa County on December 21, 1926, to recover for personal injuries alleged to have been received by plaintiff. Judgment was entered in favor of Miss Colthurst, appellee herein, on the 9th day of May, 1927.

The case of *Colthurst v. The Metropolitan Casualty Insurance Company of New York,* the present case, was commenced on March 16, 1928, in the United States District Court for the Northern District of California. This suit was brought to realize on the judgment obtained by Miss Colthurst in the prior action of *Colthurst v. Harris.* Other than that the suits are in no way related or dependent. This later suit, as this Court knows, is based upon a right created and conferred upon the judgment creditor by the statutes of the State of California.

This Court has stated that the appellee knew the insurance company with which the defendant Harris was insured, and that she knew the terms of the policy, and further that she sued upon it—facts which, we submit, cannot be found in, nor inferred from any statement in the stipulated facts or the record. We state to this Court unequivocally and emphatically and to the end that the record may be clear and justice done this appellee that when the suit of *Colthurst v. Harris* was commenced—Decem-

ber 21, 1926,—and for some time beyond the entry of the judgment in that action (May 9, 1927) neither Miss Colthurst nor her counsel knew in what company the defendant was insured.

Further, they did not know the terms of the policy issued by the insurance company until that policy was introduced in evidence in the present action, approximately two and one-half years *after* the commencement of the *Colthurst v. Harris* suit and about one year *after* the entry of judgment in that action.

Let the Court consider these further facts before depriving the appellee of her valid judgment.

1. Without a voluntary disclosure on the part of the insurer or the insured, the party plaintiff has no means of determining or discovering whether or not the defendant is insured and much less the amount or terms of the policy. There is no procedure provided in law or equity by which this fact may be compelled.

2. The insurer is not a proper party to the suit against the insured by the injured person and along this same line, any testimony tending to prove the defendant was insured is improper and, if allowed in the record, reversible error.

3. It is not until the injured person has recovered a judgment that there is any opportunity afforded to discover whether the defendant is insured and even then it is necessary to look to the Statutes of 1919, p. 776 for such authority. It provides:

> "Upon any proceeding supplementary to execution, the judgment debtor may be required to exhibit any policy carried by him, insuring

against the loss or damage for which judgment shall have been obtained." (Stats. 1919, p. 776.)

4. Automobile indemnity policies are not required to be in any definite form. There is no standard policy, they are as varied in their terms as there are various companies that write such policies.

CONCLUSION.

We affirm that it was not until after judgment had been rendered in the *Colthurst-Harris* suit, that the plaintiff became aware of the defendant's insurance company and the suit, which is on appeal before this Court, was commenced.

We respectfully suggest that the opinion rendered in this case is to the practical effect that a person run down and injured on the street, or thrown carelessly from a motor vehicle is forthwith charged with the knowledge of the existence of an indemnity policy, the name and address of the indemnitor, the amount and terms of the policy and although there is no method or means to ascertain any of these facts on the part of the injured person, still such person may not recover. Reason does not lend support to such a doctrine and the Statute of California should not be so emasculated.

The decision of this Court has deprived the appellee of a valid judgment, and it is especially wrong because this Court has based its decision upon a fact not in the record and a fact that cannot be inferred from anything in the record and it has assumed as a

fact knowledge on the part of appellee that she did not have.

Dated, San Francisco,
January 2, 1930.

Respectfully submitted,

HARRY I. STAFFORD,
DANIEL R. SHOEMAKER,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
January 2, 1930.

HARRY I. STAFFORD,
Of Counsel for Appellee and Petitioner.